INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:	
On Lee v. *United States*, 343 U. S. 747	8
Pereira v. *United States*, 347 U. S. 1	9, 10
Pinkerton v. *United States*, 328 U. S. 640	10
United States v. *Bayer*, 331 U. S. 532	10
Statutes:	
18 U. S. C. 2	3
26 U. S. C. 2554 (a)	2
26 U. S. C. 2557 (b)	2
47 U. S. C. 605	3

338982—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 654

SYLVESTER PAPALARDO AND PATSY LAVELLE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20) is reported at 218 F. 2d 694.

JURISDICTION

The judgment of the court of appeals was entered December 15, 1954 (Pet. 20), and a petition for rehearing was denied on February 11, 1955 (Pet. 21). The petition for a writ of certiorari was filed March 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. (a) Whether petitioners' rights under the Fourth Amendment to the United States Constitution were violated by admission of testimony with respect to conversations held in petitioner Papalardo's automobile by petitioners and a special employee of the narcotics bureau and transmitted by a microphone hidden on the employee's person to a receiving set operated by narcotic agents following in another automobile.

(b) Whether use of the transmitter violated the Federal Communications Act, 47 U. S. C. 605.

2. Whether sufficient evidence supported the verdicts on all counts of the indictment and whether sentence on the conspiracy count constituted double punishment.

STATUTES INVOLVED

26 U. S. C. 2554 (a):

> ORDER FORMS.—(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

26 U. S. C. 2557 (b):

> Whoever commits an offense or conspires to commit an offense described in this subchapter, * * * for which no specific pen-

alty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

18 U. S. C. 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

47 U. S. C. 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the

existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *.

STATEMENT

Petitioners were found guilty by a jury in the United States District Court for the Northern District of Ohio on all counts of a four-count indictment (P. A. 4–9),[1] charging them with a conspiracy to sell illicit narcotics and with the substantive offenses of making three sales thereof, in violation of 26 U. S. C. 2554, *supra,* p. 2. Papalardo was sentenced to five years imprison-

[1] The Appendix to petitioners' brief in the Court of Appeals is designated as "P. A."; the government's Appendix is designated as "G. A."

ment and a $2,000 fine on each count. The sentences on counts one and two were to run concurrently and the sentences on the other two counts consecutively to the first two, thus totalling 15 years imprisonment and fines amounting to $8,000 (P. A. 61). Petitioner Lavelle was sentenced to serve four years on the conspiracy count and three years on each of the three substantive counts, all of which were to be served consecutively (Pet. 21), making a total sentence of 13 years. The court of appeals affirmed the convictions (Pet. 20, 218 F. 2d 694).

The evidence pertinent to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Petitioner Papalardo told John Pringleton that "a lot of stuff [narcotics] was being handled out on the East end" and suggested he might make money in the business. He instructed Pringleton to "look into it" and call him "in case you find out anything" (G. A. 2). Pringleton called and met Papalardo some seven months later (G. A. 3–4), and told him he wanted two ounces of heroin. Papalardo replied that "Art," who had come with Papalardo, would "take care of" him (G. A. 5). On Art's instructions, Pringleton met Art and petitioner Lavelle later that evening (G. A. 5, 6), Lavelle being introduced as the one who "would handle things from here on in" (G. A. 7). As they drove, Pringle-

ton paid Lavalle for the narcotics (G. A. 8) and the latter pointed out the package lying on a lawn strip (G. A. 8).

Pringleton then left the Lavelle car and entered his own car. As previously arranged, he was followed by Bailey Douglas to whom he had agreed to sell the drugs (G. A. 8–9). Douglas took the drugs from the lawn strip when Pringleton pointed them out (G. A. 9). On the morning of January 31 (G. A. 10), a second such sale from Lavalle to Pringleton to Douglas was effected (G. A. 9–12) and on that evening Pringleton was arrested (G. A. 12). Douglas was also arrested on that day (G. A. 16, 17). Shortly thereafter, Pringleton became a special employee of the narcotics service (P. A. 16–18).

On June 15th a radio transmitter was hidden on Pringleton's person by narcotics agents Voll and Ellis (G. A. 21, 28), who placed the receiving unit in their car (G. A. 22, 28). After testing it for proper adjustment (G. A. 29, 30), they followed Pringleton's car part of the way to the area where he was to meet Papalardo and Lavelle (G. A. 30). On arrival there, they spotted and overtook Papalardo's car, driven by Papalardo, in which Pringleton and Lavelle were riding (G. A. 31, 36). Both agents in the pursuing car were able to distinguish the voices of the three (G. A. 24, 38–40). Papalardo was overheard advising Pringleton that he could go through with a de-

livery of three pieces (ounces) to "Eddie" (this sale constituted the fourth count of the indictment), but Papalardo insisted that in the future Pringleton was to do business without causing Papalardo to meet the customers (G. A. 24).

Pringleton made arrangements with Lavelle (G. A. 25, 40, 41) to pick up six and three-quarter ounces of heroin (count 3 of the indictment). Papalardo remarked that the "new stuff," of which this consignment was to be made, was "very good stuff" and that even his enemies were coming to him for it (G. A. 25–26, 42). Pringleton complained of Lavelle's apparent refusal to deliver to him on consignment, to which Papalardo replied that Lavelle had to pay for it himself (G. A. 40). There was further conversation in which Papalardo explained his method of delivery during the days when he himself had been in Pringleton's part of the operation (G. A. 24, 43). Papalardo ordered that no phone calls be made to him (G. A. 26, 43). Both agents testified to making memoranda of these overheard conversations immediately after abandoning their shadowing of petitioner's car (G. A. 25, 39, 44).

ARGUMENT

1. Petitioners raise in this Court, for the first time, objections to the testimony (on Fourth Amendment and other grounds) with respect to the conversations overheard on the short wave

set.[2] While the court of appeals might, in the exercise of its discretion, have considered these issues though not raised in the trial court, *On Lee* v. *United States,* 343 U. S. 747, it received no opportunity to do so.[3]

The decision of this Court in the case of *On Lee* v. *United States,* 343 U. S. 747, is precisely in point save that there the protested "search" occurred in a building whereas here the "search" occurred in an automobile moving on the open highway. There, as here, no trespass was committed by the government's operatives. This Court decided that the use of mechanical devices under such circumstances to obtain admissions against interest does not violate the Fourth Amendment.

On Lee also held that the use of the transmitter and receiver did not violate the Federal Communications Act, 47 U. S. C. 605, since "there was no interference with any communications facility which he possessed or was entitled to use" (343 U. S. at 754).

2. There was ample evidence to justify the convictions of petitioner Papalardo on all four

---

[2] On trial, petitioners first made only general objections (G. A. 23). After being overruled, they stated their ground as lack of identification of the voices heard by the agents. Satisfactory testimony as to identification was then introduced (G. A. 24, 37–39).

[3] Petitioners' only reference to the subject in their brief below was with respect to the qualifications of the instruments and to the fact that the conversations heard were only portions of conversations.

counts of the indictment.[4] In the first (January 24th) sale Papalardo, who had previously suggested that Pringleton handle narcotics for him (G. A. 2), introduced Pringleton to the person who "would take care of" him (G. A. 4, 5). With respect to the sales in June, Papalardo referred to the three ounce sale stating that he did not want to meet the purchasers (G. A. 24) and discussed his own method of delivery of narcotics (G. A. 24). When Pringleton was arranging with Lavelle to pick up the six and three-quarter ounce delivery, Papalardo discussed the merits of the heroin which he described as so good that "my enemies are buying it from me" (G. A. 25–26). There was thus ample evidence from which the jury could infer, as the judge charged they had to find in order to convict (G. A. 49), that Papalardo stimulated and encouraged, and actually participated in, the sales charged as substantive offenses. See *Pereira* v. *United States*, 347 U. S. 1, 10–11.

As to the conspiracy count, there was ample evidence to prove that Papalardo was part of a group of "wholesalers" and "retailers" who conspired to sell narcotics illegally. The fact that some of the overt acts of the conspiracy were proved as substantive offenses does not constitute double punishment since the elements of con-

[4] Lavelle's participation seems too obvious to require discussion and is not argued in the petition.

spiracy are clearly different. *Pereira* v. *United States,* 347 U. S. 1, 11; *United States* v. *Bayer,* 331 U. S. 532; *Pinkerton* v. *United States,* 328 U. S. 640.[5]

---

[5] Petitioners also assert in their argument other alleged errors at the trial. They claim error in the court's refusal to give requested Instructions 5 and 15 to the effect that "mere knowledge that a co-conspirator is engaged in other criminal conspiracies * * * is not sufficient to make a conspirator a party thereto" and that mere presence at the scene or association with others charged with crime is not sufficient to convict (Pet. 16). It seems sufficient to state that these instructions were too far removed from the evidence to require inclusion in the court's charge. The judge specifically charged as to Papalardo that the jury had to find that he aided and abetted or "consciously participated in" the sales charged as substantive offenses (G. A. 49).

Petitioners claim that there was also error in the admission of the testimony of Rollins and Douglas is likewise without merit. They were members of the chain of middle men in the handling of the narcotics which flowed down from Lavelle and Papalardo to co-conspirator Pringleton, thence to Douglas, and finally to Rollins who was working with narcotics agent Laster. This testimony helped establish the facts of the sales and their illicit character since some of the marked money issued by Laster was found on both Pringleton and Douglas.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
JOSEPH A. BARRY,
Attorneys.

APRIL 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955